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In the
Supreme Court of the United States

BAKER BOTTS L.L.P. ET AL.,

PETITIONERS,

v.

ASARCO LLC,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR FORMER BANKRUPTCY JUDGES LEIF M. CLARK AND JUDITH K. FITZGERALD AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Amici are former United States Bankruptcy Judges who have collectively devoted hundreds if not thousands of hours to reviewing fee applications. *See* Gordon Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988–1989 Bankruptcy Court Time Study*, 65 AM. BANKR. L.J. 491, 513–14 (1991) (noting that a bankruptcy judge spends an estimated 61.9 hours per year on fee applications). Those hours inspire little nostalgia, as "the fixing of compensation for professionals [is] a difficult and unpleasant task." *In re Int'l Coins & Currency, Inc.*, 22 B.R. 127, 128 (Bankr. D. Vt. 1982). But as one of the *amici* has explained, that work calls for great care on the part of the bankruptcy judge:

> [C]ourt-appointed counsel are paid only upon application to the court. The money is transferred almost literally over the judge's signature on a court order approving the fees. The affixing of a judge's signature to an order is not an empty formality. It is a judicial confirmation that the fees in question are in fact reasonable and do in fact represent compensation for actual and necessary services, measured against the

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[*] Petitioners' letter giving blanket consent to *amicus* briefs, and respondent's written consent to this brief, are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

> various factors set out in the case law. Because fees can be paid only upon court order, the court which signs that order must therefore be prepared to accept responsibility for its judicial actions by independently determining that court authorization for the fees is warranted.

In re Temple Ret. Cmty., Inc., 97 B.R. 333, 337 (Bankr. W.D. Tex. 1989) (citations omitted).

In this case, the Fifth Circuit constricted the discretionary authority of bankruptcy judges by holding that 11 U.S.C. § 330(a) "does not authorize compensation for the costs counsel or professionals bear to defend their fee applications." Pet. App. 14a. This surprising ban on "defense fees" threatens the smooth functioning of the bankruptcy courts by diluting the compensation that professionals can receive for services that are necessary and beneficial to the administration of a bankruptcy case. *See* 11 U.S.C. § 330(a)(1), (3), (4). In particular, the Fifth Circuit's misreading of Section 330(a) hinders a bankruptcy judge's ability to maintain the parity of fees that Congress deems essential to avoiding a brain drain in the bankruptcy field. *Amici* submit this brief in support of petitioners and urge the Court to reverse the decision below so that *amici's* judicial successors will be allowed to do the job that Congress has assigned.

The signatories to this brief are as follows:

Hon. Leif M. Clark. The Honorable Leif M. Clark was a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. His

opinions on the subject of compensation under Section 330(a) include *In re Saunders*, 124 B.R. 234 (Bankr. W.D. Tex. 1991), *In re Farah*, 141 B.R. 920 (Bankr. W.D. Tex. 1992), *In re Intelogic Trace, Inc.*, 188 B.R. 557 (Bankr. W.D. Tex. 1995), *In re El Paso Refinery, L.P.*, 257 B.R. 809 (Bankr. W.D. Tex. 2000), *In re Balderas*, 328 B.R. 707 (Bankr. W.D. Tex. 2005), and *In re AGE Refining, Inc.*, 447 B.R. 786 (Bankr. W.D. Tex. 2011).

Hon. Judith K. Fitzgerald. The Honorable Judith K. Fitzgerald was a United States Bankruptcy Judge for the Western District of Pennsylvania from 1987 to 2013. She served as Chief Judge of that court for five years, and also presided over matters in the District of Delaware, the Eastern District of Pennsylvania, and the District of the Virgin Islands.

INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure that a debtor's estate enjoys the benefit of assistance from talented professionals, Section 330(a) dictates that fees in bankruptcy cases may be awarded for "actual, necessary services" rendered by professionals that are beneficial to the administration of the bankruptcy case. *See* 11 U.S.C. § 330(a)(1), (3), (4). That statutory command grants bankruptcy judges broad discretion to ensure that professionals can recover reasonable compensation, which requires that their fees not be diluted relative to fees available in other cases. The application process for receiving compensation, which the Bankruptcy Code contemplates as an important part of administering a bankruptcy case, threatens fee dilution because it is demanding and onerous.

Section 330(a) gives bankruptcy judges discretionary authority to solve that problem by awarding defense fees. By administering the sweet with the bitter, bankruptcy judges can satisfy their obligation to avoid fee dilution and thus ensure that bankruptcy professionals are able to recover a reasonable fee for the essential services they perform.

ARGUMENT

I. Section 330(a) Directs The Bankruptcy Court To Scrutinize A Professional's Fee Application And To Award Reasonable Fees.

A bankruptcy judge must strike a balance when fixing a professional's reasonable compensation under Section 330(a). On the one hand, the Bankruptcy Code requires that he subject the professional to a demanding process for judging whether the fees she seeks should be paid out of the estate. On the other hand, he must take care not to unnecessarily impose bankruptcy-specific costs that would drive talent to other practice areas, harming debtors and interfering with the efficient administration of their estates.

Professionals whose fees are to be paid out of the bankruptcy estate under Section 330(a) must submit to an onerous process that helps the bankruptcy judge avoid "vicarious generosity" of the sort Chief Justice Taft condemned in *In re Gilbert*, 276 U.S. 294, 296 (1928). A professional begins by preparing "an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested."

FED. R. BANKR. P. 2016(a). As the Fifth Circuit correctly noted, this application must be supported by "ample documentation" and "detailed, itemized billing records [that] assure integrity and sharpen any potential disputes." Pet. App. 17a, 21a; *see also In re S.T.N. Enters., Inc.*, 70 B.R. 823, 835 (Bankr. D. Vt. 1987) (preparing application is "time-consuming and oppressive"). Lack of detail in the application jeopardizes the professional's entitlement to any payment at all. *See, e.g.*, *Brake v. Tavormina (In re Beverly Mfg. Corp.)*, 841 F.2d 365, 370 (11th Cir. 1988); *In re Baker*, 374 B.R. 489, 494 (Bankr. E.D.N.Y. 2007); *In re Chapman Farms*, 58 B.R. 822, 823–24 (Bankr. W.D. Wisc. 1986).

The professional's application is then opened to scrutiny and criticism before a wide audience that includes the bankruptcy judge, the United States Trustee, other trustees, the debtor, the creditors, and various committees. *See* 11 U.S.C. §§ 330(a)(1), 1109(b); FED. R. BANKR. P 2016(a). Any of these reviewers, including the bankruptcy judge on his own initiative, is entitled to object to the requested fee. *See* 11 U.S.C. § 330(a)(2); *cf.* 28 U.S.C. § 586(a)(3)(A) (authorizing United States Trustee to challenge fee applications). The objectors and the professional can then join issue over the application at a hearing. *See* 11 U.S.C. § 330(a)(1).

If the professional justifies her fee application, the bankruptcy judge "may award reasonable compensation for actual, necessary services rendered," 11 U.S.C. § 330(a)(1), reducing the award to account for any well-taken objections, *see id.* § 330(a)(2). The fee decision is subject to further

review by either the bankruptcy appellate panel or the district court, and still further review by the court of appeals and this Court. *See* 28 U.S.C. §§ 158, 1254(1). But because "[t]he bankruptcy judge is on the front line, in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls," *In re Martin*, 817 F.2d 175, 182–83 (1st Cir. 1987), he enjoys broad discretion in awarding compensation under Section 330(a). *See, e.g.*, *In re Commercial Fin. Servs., Inc.*, 427 F.3d 804, 810 (10th Cir. 2005); *Anderson v. Anderson (In re Anderson)*, 936 F.2d 199, 205 (5th Cir. 1991) (per curiam).

This process of seeking compensation under Section 330(a) is often arduous for the professional who works on a bankruptcy case, especially if a member of the gallery "mount[s] objections to extract a fee reduction." Pet. App. 139a. As Bankruptcy Judge Schmidt noted in this case:

> Bankruptcy involves a unique process whereby a lawyer who is compensated by the bankruptcy estate must publicly file his fee statements, and multiple parties are given the opportunity to object to those fees. A non-bankruptcy lawyer would not be subject either to the same level of scrutiny or to the same number of potential objectors.

Pet. App. 138a.

Bankruptcy-specific costs like these threaten to dilute the compensation that professionals receive relative to the fees recovered by professionals in other practice areas. *See In re Nucorp Energy, Inc.*,

764 F.2d 655, 658–59 (9th Cir. 1985); *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088, 1093 (5th Cir. 1980) (per curiam). A diluted fee is not a reasonable fee. As a result, fee dilution threatens to drive away the "'bankruptcy specialists[] who enable the system to operate smoothly, efficiently, and expeditiously.'" *Boyd v. Engman*, 404 B.R. 467, 483 (W.D. Mich. 2009) (quoting H.R. REP. NO. 95-595, at 330 (1977)); *see also Smith v. Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 928–29 (9th Cir. 2002); *Hennigan Bennett & Dorman LLP v. Goldin Assocs. L.L.C. (In re Worldwide Direct Inc.)*, 334 B.R. 108, 111–12 (D. Del. 2005); Pet. App. 135a–43a.

In recognition of this serious problem, Congress has instructed each bankruptcy judge to guard against fee dilution. Section 330(a)(3)(F) promotes parity of fees by commanding the bankruptcy judge to consider "the customary compensation charged by comparably skilled practitioners in" non-bankruptcy cases when "determining the amount of reasonable compensation." And Section 330(a)(6) calibrates the dilution-avoiding payment "for the preparation of a fee application," limiting the bankruptcy judge to an award "based on the level and skill reasonably required to prepare the application" so that bankruptcy professionals do not collect fees that they could not obtain from clients in other fields.

II. Section 330(a) Grants The Bankruptcy Court Broad Discretion To Avoid Fee Dilution.

Because the Bankruptcy Code establishes an onerous process for awarding fees, it falls to the bankruptcy judge to steer a safe course between

vicarious generosity and fee dilution in determining reasonable compensation under Section 330(a). *See Smith*, 317 F.3d at 928–29; *In re Fibermark, Inc.*, 349 B.R. 385, 395–96 (Bankr. D. Vt. 2006); *cf. Jacobowitz v. Double Seven Corp.*, 378 F.2d 405, 408 (9th Cir. 1967). In the words of then-Judge Brewer:

> We desire to see the officers and agents of the court well paid, in order that men of character and ability may be willing to accept the burdens and responsibilities of these trusts; but at the same time we may not forget that the property to be charged with these allowances is not ours .

Cent. Trust Co. v. Wabash, St. L. & P. Ry. Co., 32 F. 187, 188 (C.C.E.D. Mo. 1887). To satisfy the duty that Section 330(a) assigns, the bankruptcy judge must press each professional for enough information to assess her fee application and any objections, while taking care that the necessary costs of oversight do not discourage bankruptcy practice by diminishing the award of reasonable fees.

The bankruptcy judge is empowered to perform this delicate task by Section 330(a), which grants the judge "discretion to award compensation for the defense of a fee application." Pet. i; *cf.* 11 U.S.C. § 330(a)(1)(A) ("[T]he court *may* award reasonable compensation " (emphasis added)). When the bankruptcy judge awards defense fees to temper bankruptcy-specific oversight costs and thus avoid fee dilution, he is properly compensating the professional for services that were both "necessary to the administration of [the] case," *id.* § 330(a)(3)(C), (4)(A)(ii)(II), and "reasonably likely to benefit the

debtor's estate," *id.* § 330(a)(4)(A)(ii)(I). Were it otherwise, there would be no need to limit compensation for preparing a fee application. *See id.* § 330(a)(6). The contested fee-award procedure is a necessary process under the Code that helps the bankruptcy judge determine how much compensation should be paid out of the debtor's estate. The debtor's estate benefits when talented professionals are attracted to the bankruptcy field by the prospect of reasonable (and hence undiluted) fees.

This is not to say that defense fees should be dispensed automatically—Section 330(a)(1)(A) uses a "may," not a "shall." *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 346 (2005); *see also Smith*, 317 F.3d at 928 (rejecting "the *per se* award of administrative fees arising from litigation of a fee application"). Instead, bankruptcy judges must make case-by-case decisions about the need for defense fees, drawing on their unmatched familiarity with the relevant litigation. *See id.* at 929 (noting that entitlement to defense fees "depends on the circumstances and is largely a matter within the informed discretion of the bankruptcy court"); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (noting lower court's "superior understanding of the litigation"); *Trustees v. Greenough*, 105 U.S. 527, 537 (1882) (noting lower court's "far better means of knowing what is just and reasonable"). The Fifth Circuit's observation that, "[i]n bankruptcy, the equities are quite different," confirms the wisdom of leaving these decisions to *bankruptcy* judges—those who understand the equities better than anyone. Pet. App. 17a.

The case-by-case exercise of defense-fee discretion has not caused problems in the many places where the practice occurs. To avoid inviting litigation for litigation's sake, courts reduce or deny compensation for the unsuccessful prosecution of fee applications. *See, e.g.*, *Boldt v. Crake (In re Riverside-Linden Inv. Co.)*, 945 F.2d 320, 322–23 (9th Cir. 1991); *Prappas & Eidman v. Smith (In re Mira-Pak, Inc.)*, 922 F.2d 214, 215–16 (5th Cir. 1991) (per curiam); *In re Quigley Co.*, 500 B.R. 347, 370–71 (Bankr. S.D.N.Y. 2013); *cf. Comm'r v. Jean*, 496 U.S. 154, 163 n.10 (1990) ("[F]ees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation."). Some bankruptcy judges limit the defense-fee amount to a single-digit percentage of the underlying fee. *See, e.g.*, Pet. App. 141a n.124 (collecting cases); *In re Millennium Multiple Emp'r Welfare Benefit Plan*, 470 B.R. 203, 217–18 (Bankr. W.D. Okla. 2012). Others probe defense-fee reasonableness without taking such shortcuts. *See, e.g.*, *In re Kahuku Hosp.*, No. 07-176, 2011 WL 5884144, at *5–*6 (Bankr. D. Haw. Nov. 23, 2011); *In re Geneva Steel Co.*, 258 B.R. 799, 803–04 (Bankr. D. Utah 2001). "There is no precise rule or formula for making these determinations," *Hensley*, 461 U.S. at 436, but bankruptcy judges can be trusted to use their "great leeway" in determining defense fees to avoid the twin evils of vicarious generosity and fee dilution, *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979).

III. The Decision Below Prevents The Bankruptcy Court From Carrying Out Section 330(a)'s Commands.

The Fifth Circuit's reading of Section 330(a) is unsound because it deprives bankruptcy judges of discretionary authority to avert fee dilution on a case-by-case basis, preventing them from awarding reasonable compensation for necessary services. Implicitly conceding this flaw, the opinion below suggests two alternative solutions: inflated billing rates and fee-shifting sanctions. These stopgaps offer inadequate protection against a brain drain caused by bankruptcy's "unique process" for scrutinizing fee applications. Pet. App. 138a.

After telling professionals that "defend[ing] their fee applications [is] a cost of doing business" in bankruptcy, the Fifth Circuit invites them to take self-help measures. Pet. App. 17a–18a. Specifically, the opinion below advises that "[w]hen firms become aware that they may not be reimbursed for defending core fee applications, they can anticipate this possibility in their hourly rates." Pet. App. 18a n.7.

This rate-padding scheme will make the fee award process less transparent—undermining the open and rigorous fee-review process the Bankruptcy Code establishes—but it will not undo the dilution caused by the Fifth Circuit's holding. A professional who artificially inflates her hourly rate to account for the bankruptcy-specific risk of fee litigation should draw scrutiny from the bankruptcy judge, who must consider "the rates charged for such services" and "the customary compensation charged by comparably skilled practitioners in" non-bankruptcy cases.

11 U.S.C. § 330(a)(3)(B), (F); *see In re Fleming Cos.*, 304 B.R. 85, 92–93 (Bankr. D. Del. 2003); 28 C.F.R. pt. 58, app. A, § (b)(1)(iii). And under the Fifth Circuit's atextual "test of reasonableness and necessity *to the debtor's estate*," the professional could hardly justify receipt of such a premium. Pet. App. 16a. As the Fifth Circuit might put it, "[t]he primary beneficiary of [an anti-dilution rate premium], of course, is the professional." Pet. App. 15a.

In any event, there is no sense in wresting discretion from the bankruptcy judge and giving it to the professionals who seek to be paid out of the estate. If fee dilution "is in the eye of the beholder," Pet. App. 19a, that would seem to counsel against deferring to those accused of complicity in a "conspiracy of silence," Pet. App. 20a (quoting *Pierson & Gaylen v. Creel & Atwood (In re Consol. Bancshares, Inc.)*, 785 F.2d 1249, 1255 (5th Cir. 1986)). The notion that a "claim for comparability is easily made but difficult to analyze" calls for more reliance on expert bankruptcy judges, not less. Pet. App. 18a. A bankruptcy judge who has discretion to award reasonable defense fees is not bound to do so at the request of a professional with "perverse incentives." *Id.* The bankruptcy judge can always say no. *See Jean*, 496 U.S. at 163 ("Exorbitant, unfounded, or procedurally defective fee applications are matters that the [judge] can recognize and discount."); *In re S. Cal. Sunbelt Developers, Inc.*, 608 F.3d 456, 463 n.2 (9th Cir. 2010) ("[W]e reject [the] contention that permitting recovery of fees on fees fosters a 'lottery mentality' and invites debtors to engage in excessive fee litigation.").

The opinion below also expresses "confiden[ce] that bankruptcy courts, practicing vigilance and sound case management, can thwart punitive or excessively costly attacks on professional fee applications." Pet. App. 21a. Flattering words aside, the Fifth Circuit's interpretation of Section 330(a) deprives bankruptcy judges of the authority they need to manage their cases. Vigilance alone will not get the job done, and neither will the fee-shifting sanctions proposed by the opinion below. *See id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)); *see also* FED. R. BANKR. P. 9011.

The standard for imposing sanctions is too high for bankruptcy judges to prevent dilution with that rarely used cudgel. *See Chambers*, 501 U.S. at 44 (dictating "restraint and discretion"); *Santa Fe Minerals, Inc. v. BEPCO, L.P. (In re 15375 Mem'l Corp.)*, 430 B.R. 142, 150 (Bankr. D. Del. 2010) (demanding "exceptional circumstances where a claim is patently unmeritorious or frivolous" (internal quotation marks omitted)). In many bankruptcy cases, fee dilution is likely to occur even if the professional cannot show that "the very temple of justice has been defiled" by an objection to her application. *Chambers*, 501 U.S. at 46 (internal quotation marks omitted). The "no-win situation" described by Bankruptcy Judge Schmidt, in which "the resources the applicant would expend fighting objections could quickly overtake the value of the reduction the objector sought," Pet. App. 140a, will discourage bankruptcy practice without regard to the presence or absence of "bad-faith conduct," *Chambers*, 501 U.S. at 47.

The inadequacy of sanctions can be illustrated with a hypothetical: Suppose the bankruptcy judge, acting sua sponte under Section 330(a)(2), flags a perceived problem with the professional's fee application. The professional prepares a response, at some nontrivial cost, and the bankruptcy judge is ultimately persuaded to award fees as originally requested by the application. Nobody has done anything wrong here. To the contrary, the process is precisely what the Bankruptcy Code requires. The bankruptcy judge has performed his "*duty* to review fee applications," *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 841 (3d Cir. 1994) (emphasis added), while the professional has provided a service "necessary to the administration of the case" within the meaning of Section 330(a)(4)(A)(ii)(II) by preparing a useful response to the concerns from the bench. The bankruptcy judge certainly will not sanction himself, so the Fifth Circuit's sanctions-only approach will force the professional to bear the bankruptcy-specific cost of defending her successful application. That cannot be right—Section 330(a) must be understood to give bankruptcy judges the power to effect the statute's anti-dilution command.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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